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Nos. 84-1555 & 84-1567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN L. CONNOLLY, *et al.*,
Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND COMPANY, INC.,
Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

Of Counsel:
JAN S. AMUNDSON
General Counsel
GARY D. LIPKIN
Assistant General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1776 F Street, N.W.
Washington, D.C. 20006
(202) 637-3057

CHESTER W. NOSAL *
JOHN R. KEYS, JR.
WINSTON & STRAWN
2550 M Street, N.W.
Washington, D.C. 20037
(202) 828-8400

COLUMBUS R. GANGEMI
WINSTON & STRAWN
One First National Plaza
Chicago, Illinois 60603
(312) 558-5600
Counsel for the National Association of Manufacturers

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

The National Association of Manufacturers (NAM) files this brief by consent of the parties in support of the appellants. Written consents are filed with the Office of the Clerk.

INTEREST OF THE AMICUS CURIAE

The NAM is a not-for-profit, voluntary business association incorporated under the laws of the State of New York representing approximately 13,500 manufacturers and related business concerns which, in the aggre-

gate, account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output. Many of NAM's members are required by their collective bargaining agreements with various labor unions to make payments to multiemployer pension plans, and many of these plans have some measure of unfunded vested benefits.

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), P.L. 96-364, created and imposed upon contributing employers a liability for the unfunded vested benefits of multiemployer plans which reaches into the tens of billions of dollars and which by the initial estimate of the Pension Benefit Guaranty Corporation (PBGC) exceeded $50 billion.[1] A recent General Accounting Office (GAO) report found $10 billion in unfunded liability in a survey sample consisting of 91 plans—only about 4.7 percent of the total number of plans nationwide.[2] This liability directly affects employers even when they have not withdrawn from a plan because it must be reflected in their financial statements. *Peick v. PBGC*, 724 F.2d 1247, 1278 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984) (dissenting opinion). See p. 6, *infra*.

The withdrawal liability provisions of MPPAA are disrupting the day-to-day conduct of American business. See 128 Cong. Rec. E5326 (daily ed. Dec. 18, 1982). Busi-

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[1] See Pension Benefit Guaranty Corporation, Multiemployer Study Required By P.L. 95-214, App. XIV, at 11, 14 (July 1, 1978) printed in *Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives*, 96th Cong., 1st Sess., 1149-1481 (1980) [hereinafter "*PBGC Report*"].

[2] GAO, *Report to the Congress, Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans*, 9 (March 14, 1985) [hereinafter "*GAO Report*"].

nesses cannot be sold; older businessmen cannot retire. *Id.*, 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982). Plants with declining demand for their products cannot close. *Id.* Huge liabilities are being imposed upon employers as a result of events they do not control, such as losing a competitive bid contract or bargaining to impasse with a labor union. 128 Cong. Rec. E4551 (daily ed. Oct. 1, 1982). Joining a multiemployer plan has become a strike issue. The plans themselves are curtailed in their efforts to recruit new entrants.[3] The threat of withdrawal liability is being used to create serious dislocations in labor-management relations and in the administration of the pension plans themselves.[4] Employers, plans, and plan beneficiaries all are suffering as a direct result of MPPAA's creation of withdrawal liability.

Since NAM member companies are some of the principal obligors of MPPAA withdrawal liability, and since

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[3] One recent study of trucking industry pension plans concluded that MPPAA operates as a significant disincentive to new employers joining multiemployer plans and is, therefore, a major cause of a decline in active participants in such plans, which in turn is causing a decline in the plans' financial conditions. ICF Incorporated, *The Characteristics of Multiemployer Pension Plans in the Trucking Industry* (submitted to American Trucking Associations) (May 1985).

[4] For example, in a complaint recently filed in the United States District Court for the Western District of Washington by the employer trustees of the Western Conference of Teamsters Pension Trust Fund against the Fund's union trustees, the Western Conference of Teamsters and the International Brotherhood of Teamsters, the plaintiffs allege that the Fund's union trustees, under direction from the Western Conference and the Teamsters International, have acted to preserve and substantially *expand* the Fund's unfunded vested liability as a means of creating economic disincentives against employers withdrawing and going nonunion. *Bennett et al. v. Ballew, et al.*, No. C850714, Complaint ¶ 18 (W.D. Wash., filed Apr. 25, 1985). The Western Conference Fund has some 13,000 contributing employers and 515,000 participants. *Id.* ¶ 5.

NAM and its members have a profound and lasting interest in the well-being of the multiemployer pension system in the United States, NAM is vitally interested in the Court's decision in this case.

SUPPLEMENTAL STATEMENT

MPPAA requires that an employer[5] withdrawing from a multiemployer pension plan pay to the plan a pro rata share of the plan's "unfunded vested liability." 29 U.S.C. §§ 1381, *et seq.* (1982). These multiemployer plans are entities created by private contracts to provide pension benefits to covered employees in various industries. The "withdrawal liability" required by MPPAA represents in most cases additional contributions to the plan far in excess of what the employer agreed in its labor contracts. Withdrawal liability, moreover, bears no relationship to the actual cost to an employer of providing for his own employees the same level of benefits promised by the plan.[6] Nor is an employer's liability directly related to the payment of benefits to his own former employees.

The unfunded vested liability for which withdrawing employers must now pay was created for the most part

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[5] MPPAA defines an "employer" to be the group of corporations or other business organizations under common control which includes the employer contracting under the collective bargaining agreement. 29 U.S.C. § 1301(b)(1) (1982); 26 U.S.C. § 414(c) (1982). *See PBGC v. Ouimet Corp.*, 630 F.2d 4, 9-12 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). One legal entity thus may be liable for another entity's withdrawal liability by operation of law without the benefit of any collective bargaining agreement, thus suggesting another taking of property.

[6] Owing to interest rate differentials, it is possible, upon plan termination, to purchase pension benefits at a fraction of the cost of benefits estimated by the plans for funding purposes. *GAO Report* at 24-33. Most plans use an interest rate of 6% for funding purposes while the PBGC's rate for immediate annuities was 10.75% in 1982. *Id.* at 26.

before MPPAA's enactment in 1980 by the actions of pension plan trustees and by the working of economic forces, but not by the employers who are now required to bear its burdens. Prior to the Employee Retirement Income Security Act (ERISA), P.L. 93-406, neither employers nor anyone else was legally liable for a plan's unfunded vested benefits, nor was any penalty attached to withdrawal from a multiemployer plan. With the passage of ERISA in 1974, certain employers contributing to multiemployer plans became subject to a strictly contingent liability. A withdrawn employer could be held to payment of a share of a plan's vested benefit liability only if the plan terminated within five years of his withdrawal, and only if the plan could not meet its obligations. 29 U.S.C. §§ 1362, 1364 (1976); *PBGC v. R. A. Gray & Co.*, —— U.S. ——, 104 S.Ct. 2709, 2713 (1984). The amount of such liability was limited to 30 percent of the employer's net worth. 29 U.S.C. §§ 1362 (b)(2), 1364(b) (1976). MPPAA for the first time imposed upon participating employers a virtually absolute liability, which could exceed each employer's net worth, for the unfunded vested benefits created and accumulated prior to MPPAA's passage, regardless of whether the plan had terminated or was able to meet its obligations. MPPAA thus operated retroactively by creating and assigning to employers an immediate new liability for funding differentials generated prior to the Act's passage.

The size of the statutory liability is staggering.[7] The total employer liability created by the statute appears to be in the tens of billions of dollars. See p. 2, *supra*. Individual employer assessments may be in the millions of dollars; many are in the hundreds of thousands of

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[7] The amount of the liabilities are calculated pursuant to various statutorily sanctioned formulas, selected by the plan trustees, which generally have no relationship to the actual cost of providing the benefit.

dollars. *GAO Report*, at 54. The absolute amounts involved may be less significant to the employer than the fact that withdrawal liability may constitute a substantial portion of, or even far exceed, the emplyoyer's net worth.[8]

An employer, moreover, need not actually withdraw from a plan in order to be affected adversely by the Act. Potential withdrawal liability must be reflected on the employer's financial statements,[9] and thus constitutes a direct reduction of the company's net worth.

The payment of potentially disabling liability may be triggered by any number of events—many of which are beyond the employer's control—and few of which would be changed by the statutory disincentive to withdrawal. The GAO found that most withdrawals (for which reasons could be ascertained) occurred because the employer

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[8] Jurisdictional Statement, Woodward Sand Co., p. 7, n. 7; *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 846 (2d Cir. 1984), *cert. denied*, 104 S.Ct. 3554 (1984) (liability equal to 82% of liquidated value of businesses); *Shelter Framing Corp. v. PBGC*, 705 F.2d 1502, 1506 (9th Cir. 1983), *rev'd sub nom. PBGC v. R.A. Gray & Co.*, 104 S.Ct. 2709 (liability equal to 180% of stockholder equity or two times company's net worth); *I.A.M. National Pension Fund Benefit Plan C v. Stockton Tri Industries*, 727 F.2d 1204, 1205-06 (D.C. Cir. 1984) (liability equal to one-half of net worth).

[9] Financial Accounting Standards Board, *Exposure Draft, Proposed Statement of Financial Accounting Standards, Employers' Accounting for Pensions* (March 22, 1985). For example, in March 1985, the Financial Accounting Standards Board issued for public comment a proposed statement of standards for employers' accounting for pensions. In that proposal, the Board stated its belief that an employer with an unfunded pension obligation has a liability which should be recognized. *Id.* (Summary). The Board proposed an accounting standard that employers participating in multiemployer plans disclose the amount of the obligations the employer would have upon withdrawal from the plan. *Id.* ¶ 64 d, e.

went out of business. *GAO Report*, at 19.[10] Other reasons for withdrawals included employees decertifying their labor unions;[11] a company's closing a subsidiary's operations within the area covered by the pension fund; relocating business operations outside the jurisdiction of the fund; selling the business to a buyer who did not continue contributions; and the death or retirement of a business owner. *GAO Report*, at 19-20. Even a government condemnation of property has caused withdrawal and devastating liability for the business owner. *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund*, 741 F.2d 451 (1st Cir. 1984), *rev'd on other grounds*, —— F.2d —— (1st Cir. 1985) (*en banc*).

The Great Majority of Multiemployer Plans Are Stable and Financially Sound

Withdrawal liability is assessed and must be paid regardless of the financial condition of the private pension plan involved or the effect of the liability on the employer.[12] Withdrawal liability must be paid in situations

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[10] *E.g., Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d at 846; *The Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1506 (D.C. Cir. 1984); *Coronet Dodge v. Speckmann*, 553 F. Supp. 518, 520 (E.D. Mo. 1982).

[11] *Flowers Industries, Inc. v. Bakery and Confectioners Union and International Pension Fund*, 565 F. Supp. 286, 287-88 (N.D. Ga. 1983); *Pacific Iron & Metal v. Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523, 524-25 (W.D. Wash. 1982).

[12] The multiemployer system is quite different than that applicable to single employer plans. First, in single employer plans, the employer makes the pension promise, whereas in multiemployer plans the trustees make the pension promise. Upon transfer of a single employer plan, there is no liability; liability only occurs when the single employer plan is terminated and underfunded. This is not the case with withdrawal liability. Single employer plans limit liability to the amount needed actually to purchase the benefit, not to speculative actuarial computations of possible future costs.

where there should be no governmental interest in pension plans which are financially and actuarily sound and which do not need such funds in order to meet their obligations or to remain solvent. Such circumstances are not the exception. They pertain to the vast majority of all multiemployer plans. *GAO Report* at 8-9, 13. Moreover, employer liability payments need not be used by the plan to reduce its unfunded liability, but instead may be used to increase benefits to current pensioners and attendant unfunded vested benefits or to reduce future contribution levels for continuing employers.

Multiemployer plans are inherently more stable than single-employer plans. H.R. Rep. No. 96-869, pt. I, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2921 [hereinafter cited as "U.S. Code Cong. News"]. An important reason for this is the "employer turnover assumption." In a stable or growing industry, the withdrawal of an employer from a plan usually will not harm the plan because new employment will fill the void created by the withdrawal. *Id.* at 2922. Either new employers will enter, or existing employers will hire additional employees. *Id.* Under such circumstances, an employer's withdrawal will not cause a net loss to the plan's contribution base. *See, e.g., Peick v. PBGC*, 724 F.2d at 1257.

The mere fact that a plan has some measure of unfunded vested benefits (UVB) is not determinative of its financial health. There are many factors which are used to measure the financial condition of defined benefit pension plans.[13] One factor is the present value of the

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[13] Some of the other quantitative factors used to evaluate the financial well-being of a plan include factors used by the PBGC in its 1977 and 1978 studies such as (1) the ratio of retired and inactive vested participants to total participants; (2) the ratio of assets to annual benefit obligations; (3) the ratio of cash flow to assets; (4) the ratio of normal cost to total contributions; and (5) the rate of increase (or decrease) in assets. PBGC Report, at 15, App. XIV.

total amount of vested benefits for which the fund is liable. This is an amount which must be amortized and funded over long periods of time (normally 30 years) and is calculated according to a set of actuarial assumptions and rules adopted by the plan. If a plan's assets are less than the value of its vested benefits, the difference is the measure of the plan's UVB.

Most multiemployer plans have some amount of UVB. In part, this is because plans generally are not designed by the trustees to fund all benefits through employer contributions. A plan can invest the funds it accumulates through contributions and can use its investment earnings to fund benefits. *See* 29 U.S.C. § 186(c)(5)(A) (1982). At any point in time the plan's assets and its liabilities are functions both of its past experience and its predictions of future experience. These in turn are based upon the decisions of the trustees and to some extent upon the operation of external economic forces. As long as the plan is amortizing its UVB on a timely basis, the plan will be in good financial condition. *See, e.g.*, 26 U.S.C. § 412 (1982). The existence of UVB on the books of a multiemployer plan thus does *not* mean that at some point in the future promised benefits will not be paid.

The vast majority of all multiemployer plans are financially sound. In its 1978 Report to Congress, the PBGC expressed concern that, despite the overall good health of multiemployer plans, there existed a relatively small number of plans, only about 2 percent of the total, which were experiencing such serious financial difficulty that they might terminate within five years. U.S. Code Cong. News 2924; PBGC Report, App. I, at 2-3. Another 10 percent were in such condition that the PBGC believed they might terminate within ten years.

A Department of Labor report released in 1984 found that "contrary to popular belief, multiemployer pension plans under collective bargaining, as a group, are rela-

tively well funded . . . ." [14] Based upon data for 1979, the year before MPPAA was passed, this study concluded that the typical multiemployer plan was well funded, with an average funding ratio of 90 percent. *Id.* at 20-21. More specifically, 86 percent of all plans were more than 50 percent funded for vested benefits. *Id.* at 21, 52. Only two percent were poorly funded, *i.e.*, with funding ratios under 25 percent. *Id.*

In 1985, the GAO estimated that only 15.9 percent of all plans are less than 50 percent funded and have low ratios of assets to benefit payments—factors the GAO says indicate a "high potential for insolvency." [15] *GAO Report*, at 8-9, 13. The converse of the GAO's conclusion is, of course, that 84 percent of all multiemployer plans are well funded.[16]

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[14] Department of Labor, *The Funding Status of Multiemployer Pension Plans and Implications for Collective Bargaining*, p. vi (1984).

[15] Even this 15.9 percent figure must provoke some skepticism. The amount of a plan's UVB is highly dependent upon the actuarial assumptions used in calculating it. *GAO Report* at 14. GAO concedes that the levels of UVB it found in its study were likely overstated because of the use of conservative assumptions. *Id.* Using less conservative interest rates, GAO estimated that total UVB for its sample might be as much as 45 percent *less* than its conservative estimate (reduced from $9.96 billion to $5.4 billion). *Id.* at 14-15. Such a drastic reduction in the amount of UVB shows that plan funding levels were higher than estimated and that fewer plans were under 50 percent funded. *See also* ICF Incorporated, *The Impact of Interest Rate Assumptions on Withdrawal Liability* (July 1985). One further implication of the controversy over the use of conservative interest rate assumptions is that the amounts of withdrawal liability being assessed are significantly greater than what is required to pay for vested benefits. *Id.* at p. 17, ES-2. It is astonishing to note, as the GAO did, that, in fact, it is possible, owing to the mechanics of calculating withdrawal liability, for a plan that is *fully* funded for vested benefits to assess substantial withdrawal liability against an employer. *GAO Report*, at 35-36.

[16] *See also*, Comptroller General, *Report to the Congress, the 1980 Multiemployer Pension Plan Amendments Act: An Assess-*

The GAO Report concluded that withdrawal liability imposed upon employers under MPPAA provided increased financial protection for those plans with "a high potential for insolvency." *GAO Report*, at 8. Consequently, withdrawal liability also provides a measure of protection of the PBGC's program. *Id.* The GAO left unstated, albeit clearly implied, that MPPAA withdrawal liability is unnecessary to provide financial protection for upwards of 84 percent of all multiemployer pension plans. Since 1980, the PBGC has had to provide financial assistance to only two multiemployer plans.[17]

SUMMARY OF ARGUMENT

The NAM believes that Congress may not, under the guise of regulation, take an employer's property and require its transfer to a private multiemployer pension plan to cover past obligations of the plan for which the

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ment of Funding Requirement Changes (Feb. 27, 1985). This report found that 90.6 percent of the plans studied were in adequate financial condition. *Id.* at 19, 23, 25, 27. A 1984 study by the Martin E. Segal Company, which the PBGC endorsed, concluded that three quarters of the plans it reviewed were *fully* funded. Another 11 percent were more than 80 percent funded. Only 4 percent of all plans were less than 50 percent funded. Martin E. Segal Company, *1984 Survey of the Funded Position of Multiemployer Plans.* See *GAO Report*, App. II, p. 72, in which the PBGC called the Segal findings "significant in view of the fact that Segal is the consulting actuary for about one-quarter of all multiemployer plans." Similarly, a 1984 industry study of some 885 construction industry plans found only 5.6 percent of those plans to be under 50 percent funded. Associated General Contractors of America, *Inventory of Construction Industry Multiemployer Pension Plans, June 1984*, at pp. vii-viii.

[17] PBGC, *1984 Annual Report*, pp. v, 12. As of the end of FY 1983, the PBGC had identified only five plans that would require future financial assistance, and it has established a reserve to cover the estimated uncollectible amount of such assistance. *Id.* at 36. In 1984, the PBGC identified no additional plans that might require future assistance. *Id.*

employer had no liability. The withdrawal liability provisions of MPPAA constitute a direct and heavy governmental interference with the reasonable, investment-backed expectations of employers who joined multiemployer pension plans prior to passage of the Act in 1980. The creation and imposition of preenactment multiemployer pension liabilities on all employers and the actual assessment of those liabilities against withdrawing employers constitute the taking of the employers' property for which no compensation is paid. This statutory scheme operates in plain contravention of the Fifth Amendment.

Withdrawal liability does not represent the mere regulation of the burdens of economic life, for, unlike true regulation, it looks backward to correction of the economic effects of past acts of others and to past events rather than to the control of future conduct. MPPAA's impact is retroactive because it created and imposed upon employers a massive liability for estimated funding differentials caused in the past and accumulated over many years—a liability for which employers were not responsible and which they certainly never agreed to assume.

The creation and mandatory payment of withdrawal liability represents the substantial destruction of established property interests of one private person for the benefit of others in a manner and in circumstances which fail to serve the purposes which Congress intended—pension security through the reduction of unfunded vested benefits. NAM accepts that Congress has broad legislative authority as to economic regulation, but this authority is not unbridled and the Taking Clause is the constitutional check on that power.

If the withdrawal provisions of MPPAA are held to be mere economic regulation, then there would no longer exist a meaningful distinction between the regulation of property and its confiscation. The Taking Clause of the Fifth Amendment would be void of real meaning.

ARGUMENT

I. MPPAA EFFECTS THE TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT

NAM submits that MPPAA clearly constitutes the taking of private property without the justification of public purpose and without compensation in violation of the Fifth Amendment.

Those lower courts that have considered the Taking Clause in the context of withdrawal liability have rejected its application. They have not, however, been able to agree as to why this should be so. This disharmony is indicative of the wrong analyses of the statute and its practical effects applied by the courts—most of whom have given little more than a passing glance to the issues involved. Most disconcerting are the conclusions reached by some courts, including the district court in the present case, that employers who are forced by law to incur huge liabilities on their balance sheets and to pay to their former pension funds hundreds of thousands or millions of dollars are in no way deprived of their "property." [18] Other courts have determined that while property rights might be involved, MPPAA is merely a governmental "adjustment of the benefits and the burdens of economic life" and does not, therefore, work a "taking" in the constitutional sense.[19] Yet another court suggested (but did not decide) that MPPAA might well effectuate an unconstitutional taking of the employer's property, if the em-

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[18] *Also, Peick v. PBGC*, 724 F.2d at 1274. *Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1406 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 2116 (1985).

[19] *Terson Company, Inc. v. Bakery Drivers and Salesmen Local 194 and Industry Pension Fund*, 739 F.2d 118, 121 (3d Cir. 1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 642-43 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 3553 (1984).

ployer could show that the liability imposed had totally destroyed his rights to the liquidation value of his business. *Keith Fulton & Sons*, 741 F.2d 451.

None of the courts that have decided the issue, however, have performed the type of analysis NAM believes is mandated by the decisions of this Court. Such analysis, when made, we submit, leads to quite different conclusions from those reached in the lower courts.

A. MPPAA Interferes With Substantial Property Interests of the Employer

The reality of MPPAA is that, following its passage, employers have been required to recognize financial liabilities on their balance sheets and upon withdrawal to pay substantial sums of money to the penion funds from which they have withdrawn. These represent the loss of property as a direct result of government action. It is not necessary to determine whether the contractual interest in limiting pension fund contributions derived from the employer's collective bargaining agreements is in itself a property interest. The employer's property interests are more obvious and tangible than that.

This Court has referred to the term "property" as including the entire "group of rights inhering in the citizen's [ownership]." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 142 (1978) (dissent), *quoting*, *United States v. General Motors*, 323 U.S. 373, 377-78 (1945). *See Ruckelshaus v. Monsanto Co.*, —— U.S. ——, 104 S.Ct. 2862, 2873-74 (1984). The notion of property extends "beyond land and tangible goods and includes the products of an individual's 'labour and invention.'" *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. at 2873, *citing* 2 W. Blackstone, *Commentaries*. The Taking Clause is addressed to "every sort of interest the citizen may possess." *General Motors*, 323 U.S. at 377-78. Elsewhere the Court has defined property in terms of the "interests that were sufficiently bound up with the reason-

able expectations" of the owner. *Penn Central*, 438 U.S. at 124-25.

An employer certainly owns the money it must use to pay withdrawal liability. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). He has an ownership interest in all of the assets of his company —whether they are physical, cash, or more intangible items. The Court has found the existence of property in much less tangible interests than the money or the imposed liabilities involved here. *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. at 2873.

The employers' interests destroyed or diminished by MPPAA are indeed reasonable investment-backed expectations. Prior to the passage of MPPAA, an employer had a reasonable expectation of keeping the value of his business upon withdrawing from a multiemployer pension plan. He had entered into pre-MPPAA collective bargaining agreements with the expectation that he could contribute clearly defined amounts to the pension plan to provide for his employees' retirements. The employer who had contributed to a multiemployer pension plan also could reasonably expect that he was not legally liable for any actuarial discrepancy between the assets of the plan and its projected vested liability. In the first place, the employer had nothing to do with creating this differential, and in the second place, the differential had never been recognized as a legal liability attributable to anyone. With respect to the vast majority of plans which were not in any financial difficulty, such funding differentials were merely theoretical and did not even represent a recognized problem.

The employer participating in a multiemployer plan, especially a well-funded plan, could reasonably expect to be able to sell his business, sell his assets, or for other legitimate business reasons, withdraw from the plan without incurring legal liability for the penion plan's unfunded vested benefits in amounts which could substan-

tially diminish, if not completely eliminate, the economic value of the business property. The employer's collective bargaining agreements, which explicitly limited the amount of his contributions to the plan, were a primary, although by no means the only, reason that the employer's expectations in this regard were reasonable.

In 1974, ERISA itself had created reasonable expectations that employers might become liable for funding shortfalls only upon the termination of their plans in an insolvent state. During the period 1974-1980, Congress in effect had represented to employers that they could withdraw from multiemployer plans without liability, unless the plan subsequently terminated and was underfunded. In *Ruckelshaus v. Monsanto Co.*, this Court held that, under a prior statutory scheme, such a legislative guarantee formed the basis of a reasonable investment-backed expectation. 104 S.Ct. at 2877-79.

Prior to MPPAA's passage, employers had reasonable expectations that their financial assets were not subject to confiscation by their pension plans upon withdrawal—especially withdrawal from healthy plans—and they clearly possessed economic interests that were bound up with those expectations.[20] The money in the company could be used for whatever purpose the employer saw fit and would not have to be committed to the payment of pension plan UVBs. To suggest, as some courts have, that the money and value of which the employer is clearly deprived by operation of the statute does not violate the Taking Clause because it is not "property" defies the definition of the term and defies the sense of the Court's jurisprudence; it is plainly arbitrary and irrational.

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[20] Stockholders who have sold businesses which were employers contributing to multiemployer plans have had to reduce the price for the stock to reflect the pension liability of the employer even though there was no withdrawal. This form of taking is even more disturbing, for the pension plan never gets the benefit of the property.

B. The Imposition of Withdrawal Liability Constitutes a Taking of the Employer's Property

This Court has noted that the Fifth Amendment's Taking Clause "is designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 123, *quoting*, *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The principle was well illustrated in its application in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), in which the Court struck down as a violation of the Taking Clause a federal statute which applied retroactively to permit mortgage debtors to purchase their property for less than fair market value, thus taking the rights of the mortgage lender. There Justice Brandeis, writing for the Court, stated that:

> The Fifth Amendment commands that, however great the nation's need, private property shall not be . . . taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of relief afforded in the public interest may be borne by the public.

Id. at 602. *See United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

In *Penn Central*, the Court observed the difficulty it has had in developing a set formula "for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. 438 U.S. at 124. It identified, however, the factors it considered particularly significant in determining whether a taking had occurred. *Id.* These included

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . . [And] the character of the governmental action.

Id.; *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. at 2875. With respect to the latter factor, the Court in *Penn Central* went on to state that a taking might be "more readily found" when the interference takes the form of a physical invasion than when "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. It is this last phrase the courts have seized upon and applied as a fast rule of law to disavow the existence of a taking in the present context.

The plain language of *Penn Central* indicates that it was never intended to state a definite rule that government economic regulation could not constitute a taking. Indeed, the Court has long recognized that government regulation that goes "too far" can and will be held to be a taking of property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, —— U.S. ——, 53 U.S.L.W. 4969 (June 28, 1985). As the Court recently reiterated in *Ruckelshaus v. Monsanto Co.*, "governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." 104 S. Ct. at 2874, *quoting United States v. General Motors Corp.*, 323 U.S. at 378. *Penn Central*, we submit, merely recognizes the difficulty of analysis of the taking issue when government regulation has caused economic injury without a clear physical invasion. The analysis still must be done.

MPPAA's imposition of withdrawal liability, as it applies to the $50 billion pre-1980 pension obligation, exhibits few characteristics of true regulation. In the first

place, it is plainly retroactive rather than prospective in its effect. *See, United States v. Security Industrial Bank*, 459 U.S. 70 (1982) ("[T]here is substantial doubt whether the retroactive destruction of the appellees' liens . . . comports with the Fifth Amendment"). It created a new and unexpected legal liability for the results of past events and conduct by others and assigned that obligation to employers, causing them immediate economic injury.

The MPPAA withdrawal liability provisions generally do not regulate conduct prospectively, such as by mandating faster funding or even by requiring that the liability payments be used to reduce the supposed underfunding. MPPAA does not purport to regulate the act of withdrawal and indeed could not do so because the conduct which results in withdrawal generally is legitimate business or labor behavior. The Act does not regulate in the common sense of preventing the use of property in a manner detrimental to the public interest. Rather, it takes property by requiring the employer to pay to the pension fund some amount of withdrawal liability calculated by the plan.

Unlike regulation, the statute does not apply equally to all persons subject to its provisions. Employers who withdraw will experience different results from application of the statute depending upon the rules and financial condition of their plans. Some withdrawing employers pay nothing, if the plan is fully funded; others may have to pay and be wiped out by the liability.

In concept and operation, MPPAA is clearly more like the outright destruction of property involved in *Radford*, *Armstrong*, and *Ruckelshaus*, *supra*, than like traditional forms of government regulation of the use of property.[21] When a withdrawal occurs, the Act mandates that the

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[21] *E.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (land use); *Penn Central*, 438 U.S. 204, and cases cited therein.

employer, merely upon demand by the pension fund, transfer its property to the plan to be used for whatever purposes the plan sees fit. This is not a mere abstract diminution in the economic value of the employer's property. It is a direct and absolute confiscation of one citizen's private property for the benefit of other private citizens. It is a forced contribution to the general revenues of the plan. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S., at 163.

That impact upon the employer may be substantial. The interference with the precise subject matter of the taking—the monies required for payment—is, of course, complete. The impact may also be devastating in relative terms—substantially diminishing or even wiping out entirely the employer's net worth. See pp. 5-6, *supra*. It is in these respects wholly different from the sort of partial interference involved in *Penn Central*.

Moreover, when MPPAA became law on September 26, 1980, it suddenly created a massive $50 billion plus legal liability for pension funding differentials. Those differentials had been accumulating gradually since the late 1940s and had never before constituted cognizable legal liability. Now they constitute reportable liabilities on the books of the companies that participate in these plans which directly reduce all of these firms' net worth.

For any employer who joined and participated in a multiemployer plan prior to September 26, 1980, and was thereafter burdened with liability for UVB accumulated prior to that date, withdrawal liability represented a dramatic interference with his investment-backed expectations. A business that was only marginally profitable or actually failing could no longer sell or liquidate without incurring substantial unbargained for liabilities which might consume what remaining worth the employer had. An employer's employees, simply by changing their union representation, might cripple the company economically. Labor unions may unleash the specter of with-

drawal liability to obtain significant concessions in collective bargaining because the employer cannot afford to reach an impasse. *See, e.g., Shelter Framing Corp. v. PBGC*, 705 F.2d at 1506; *S&M Paving, Inc. v. Construction Laborers Pension Trust of Southern California*, 539 F. Supp. 867, 868 (C.D. Cal. 1982). Without doubt, MPPAA interferes very directly and quite substantially —often completely—with the employer's investment-backed expectations concerning the value of his business and the use of his assets.

NAM submits that at least as to employers who participated in multiemployer plans pursuant to collective bargaining agreements entered into prior to September 26, 1980, the imposition of withdrawal liability for unfunded vested benefits created prior to that date represents a taking of the employer's property. It is this retroactive imposition of liability for past events and circumstances that substantially interferes with the employer's reasonable investment-backed expectations—*i.e.*, that takes his property.

If Congress has determined through ERISA that it is a matter of public concern that pension plans reduce or eliminate unfunded vested benefits, regardless of the plan's design and regardless of whether the employers ever agreed to contribute sufficient funds to pay for such benefit levels, then the burden of that governmental concern is being allocated disproportionately to a small group of employers. The public as such assumes none of the burden.[22] Employers who continue in the plans pay nothing more than what their contracts specify. It is only

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[22] Congress could have imposed higher premiums on its PBGC insurance and mandated faster funding with minimum funding levels. In so doing, it would never have had to create withdrawal liability and impose the taking inherent in the concept of withdrawal liability. Such action would have been purely in the nature of regulation.

the relatively small group of employers who withdraw—many of whom are the least able to bear such burdens—who must actually pay allocated shares of unfunded vested benefits, in violation of the most fundamental tenet of the Fifth Amendment.

The imposition of withdrawal liability is a taking of property. It goes virtually without saying that this taking is not compensated.

C. The Taking of the Employer's Property Is Not Justified by a Public Purpose

While it is unnecessary, if there is an uncompensated taking of private property, to determine whether that taking is supported by a public purpose, the lack of a clear public purpose in most withdrawal liability further reflects MPPAA's conflict with the Constitution.

This Court has recently reaffirmed that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Hawaii Housing Authority, et al. v. Midkiff, et al.*, —— U.S. ——, 104 S. Ct. 2321, 2329 (1984), *quoting Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937). This Court's role in ascertaining the existence of a public purpose is limited to determining whether Congress' purpose is legitimate and whether Congress rationally could have believed that the provisions would promote that objective. *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. at 2330.

Congress might legitimately concern itself with the payment of promised pension benefits in cases where the private system has failed. But, when a pension plan that is well-funded and not in danger of insolvency assesses withdrawal liability against an employer who has withdrawn involuntarily or for legitimate business reasons, it is difficult to ascertain any public purpose in the taking. This is especially true when the withdrawal results

in no loss to the plan's contribution base. In such cases, withdrawal liability does not represent the payment of promised benefits that would not otherwise be paid nor does it appreciably protect the PBGC's assets. Congress does not have a legitimate purpose in transferring, through retroactive legislation, the wealth of a few employers to private pension plans so that benefits may be increased or contributions by other employers reduced.

While it may be difficult for Congress in enacting legislation ostensibly for the protection of financially troubled plans to determine in advance which plans are distressed and when its remedies therefore should apply, this does not negate the fact that in the great majority of cases the imposition of withdrawal liability serves no discernible governmental purpose. Congress made no attempt to limit the remedy of withdrawal liability to those cases in which it would serve the legislative purpose. It is, moreover, both possible and practical to ascertain objectively which plans are in trouble and which are not. The PBGC, the GAO, and the DOL all have used objective criteria, such as funding ratios, asset-to benefit payment ratios and the like, to make such determinations for their own purposes. *See* pp. 8-9, *supra*.

Even where there is a need for better plan funding, withdrawal liability cannot be justified. First, it is an uncompensated taking. Further, the nature of the property negates the implication of a public purpose. Since money is fungible and an employer's money is no different from the money of anyone else, there can be no public purpose satisfied by the taking of the employer's money. The public has no particular need for the distinct property being taken.

Where the facts and circumstancs of a case demonstrate that no public purpose exists, an assessment of withdrawal liability is clearly an unconstitutional taking of private property.

II. THE COURT WILL NOT DEBILITATE MULTIEMPLOYER PENSION PLANS, IF IT REVERSES THE DECISION BELOW

Should the Court reverse the lower Court's decision, it will not radically affect the multiemployer pension plan system. Only a very few multiemployer plans have serious financial difficulties, and it appears that the PBGC has adequate assets in its multiemployer fund to cover these identifiable contingencies.[23] For the great majority of plans, elimination of withdrawal liability would represent merely the loss of periodic windfall payments. Voiding this liability would, on the other hand, eliminate a serious impediment to new employers joining and stabilizing or increasing the contribution base of multiemployer plans. It would relieve the economic gridlock caused by withdrawal liability.

Should the Court hold MPPAA's withdrawal liability provisions unconstitutional, moreover, the effect could be the reinstatement of Sections 4062 and 4064 of ERISA, 29 U.S.C. §§ 1362, 1364 (1976), which had provided for the system of contingent liability in the period before MPPAA.[24]

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[23] The PBGC has established a reserve of $19.4 million for future financial assistance to cover estimated nonrecoverable future payments to be made for multiemployer plans that have notified the PBGC they are experiencing financial difficulty. PBGC, *1984 Annual Report*, at 29, 39. Overall, the PBGC reports the assets of its multiemployer program as $60.8 million. *Id.* at 29-29. As of FY 1984, the PBGC's multiemployer fund has experienced no net loss from program operations, and, in fact, would appear to have experienced a $17 million gain. *Id.* at 30-31; PBGC, *1982 Annual Report*. This is to be distinguished from the experience of the single employer fund.

[24] Sections 403(g)-(i) of MPPAA, 94 Stat. 1301, amended Sections 4062-4064 of ERISA, 29 U.S.C. §§ 1362-1364 (1976), to make those earlier provisions inapplicable to multiemployer plans. These conforming amendments are not severable from the withdrawal liability provisions of MPPAA. *INS v. Chadha*, —— U.S. ——, 103 S.Ct. 2764, 2775 (1983); *Buckley v. Valeo*, 424 U.S. 1, 108

Congress can act to avoid problems brought on by distressed pension plans, but legislative solutions must be designed to fit the problem. *See, United States Trust Co. v. New Jersey*, 431 U.S. 1, 31 (1977). We suggest, too, that if the problem were, as Congress seems to have thought, one of broad public import, then the teachings of *Radford*, *Armstrong* and other cases ought to be heeded and the problem shared more by the public. Congress has the power to regulate to insure better funding of multiemployer plans and to collect and distribute funds necessary to afford financial protection for poorly funded plans experiencing financial difficulties without violating the Taking Clause. The withdrawal provisions of MPPAA have failed to do that.

NAM and its member companies feel strongly that pension obligations must be taken seriously and fulfilled. The future of the defined benefit pension program in this country, however, does not lie in legislating massive, retroactive, unnecessary, unfair transfers of wealth from employers into private pension plans in subversion of constitutional principles. More moderate, targeted solutions to better funding of multiemployer plans are available. While it is not the role of the Court to dictate legislative solutions, the Court can and should nevertheless find that what Congress has done in MPPAA is plainly and deeply inconsistent with the most elemental principles of the Constitution. Congress' authority to regulate economic affairs is expansive but not limitless. The Taking Clause still stands as a bulwark against excessive regulation that confiscates rather than restricts the use of property, that destroys ownership rather than merely limits its incidents in the name of the common good. MPPAA's withdrawal liability is not regulation; it is an unconstitutional taking of private property.

(1975). Thus, if the withdrawal liability provisions are declared unconstitutional and void, the conforming amendments are also void and the contingent liability provisions of ERISA would again be applicable to multiemployer plans.

CONCLUSION

The decision of the District Court should be reversed.

Respectfully submitted,

Of Counsel:
JAN S. AMUNDSON
General Counsel
GARY D. LIPKIN
Assistant General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1776 F Street, N.W.
Washington, D.C. 20006
(202) 637-3057

CHESTER W. NOSAL *
JOHN R. KEYS, JR.
WINSTON & STRAWN
2550 M Street, N.W.
Washington, D.C. 20037
(202) 828-8400

COLUMBUS R. GANGEMI
WINSTON & STRAWN
One First National Plaza
Chicago, Illinois 60603
(312) 558-5600
Counsel for the National Association of Manufacturers

* *Counsel of Record*

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